IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EARL COFIELD, et al.	*	
Plaintiffs	*	
vs.	*	**CIVIL ACTION NO. MJG-99-3277**
LEAD INDUSTRIES ASSOCIATION, INC., et al.	*	
Defendants	*	

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MEMORANDUM AND ORDER

The Court has before it the Defendants' Motion for Reconsideration and Dismissal of Bruning Paint Company Pursuant to Rule 21 of the Federal Rules of Civil Procedure, Plaintiff's Renewed Motion to Remand, and the materials submitted by the parties relating thereto. The Court has held a hearing and has had the benefit of the arguments of counsel.

I. BACKGROUND

On September 21, 1999 Plaintiffs' counsel filed two cases against the same defendants in the Circuit Court for Baltimore City seeking recovery for damages caused by lead paint, Cofield v. Lead Paint Industries Ass'n, Inc., Case No. 24-C-99-004491, and Smith v. Lead Industries Ass'n, Inc., Case No. 24-C-99-004490. In Cofield, a proposed class of Plaintiffs seek recovery for the costs associated with the removal of lead paint in

residential properties and the alleged diminution in value of residential properties caused by the presence of lead paint in pre-1978 housing. In Smith, several Plaintiffs seek recovery with respect to injuries sustained by minors who were exposed to lead paint.

Plaintiffs' counsel sought to frame both suits so as to avoid federal diversity jurisdiction. In view of the Maryland citizenship of the Plaintiffs, it was necessary to name a Maryland defendant to destroy complete diversity. Accordingly, Plaintiffs' counsel included as a defendant, Bruning Paint Company ("BPC"), a Maryland citizen for diversity purposes,[1] even though BPC had never manufactured or sold lead paint. BPC had, however, purchased the assets of Kewanee Industries, Inc.'s[2] Bruning Paint Division ("BP Division"). Plaintiffs assert that the BP Division had sold lead paint prior to the asset acquisition.

The Defendants timely removed Cofield and Smith to this Court, asserting fraudulent joinder with regard to BPC. The

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[1]BPC is a Delaware corporation which has its principal place of business in Maryland.

[2]Kewanee Industries, Inc. ("Kewanee") was, at the time of the transfer of the BP Division to BPC, a subsidiary of Gulf Oil Corp. Kewanee is a Delaware corporation which has its principal place of business in California.

Smith case was assigned to Judge Smalkin who, expeditiously, remanded the case. The undersigned Judge promptly issued an Order following Judge Smalkin and remanding Cofield but provided that if the Defendants requested reconsideration it would consider the matter. The Defendants have moved for reconsideration and the matter of fraudulent joinder has been presented fully.[3]

While from a superficial first glance the Smith and Cofield cases appeared to present similar circumstances calling for resolution in the same court, a careful examination reveals that the two cases are indeed quite different. The Smith case presents claims concerning individual Plaintiffs who allegedly suffered injuries due to exposure to lead paint. Smith is, therefore, a relatively straightforward product liability personal injury dispute. The Cofield case, in stark contrast, is a class action, in which a proposed class of homeowners[4] seeks compensation for property damage. The Cofield and Smith cases

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[3]In the interim, the undersigned Judge has coordinated efforts with the State judge assigned to Smith.

[4]The proposed class consists of "[a]ll persons who own and occupy single-family, residential dwelling units situated within the State of Maryland which units were constructed no later than 1978 and which units either did or do contain lead paint." Compl. ¶ 46.

would, therefore, proceed on very different "tracks" even if the cases were in the same court.

The initial stage of the Cofield case will include extensive proceedings regarding class certification. Smith presents no such issues, but, instead, includes issues unique to lead paint personal injury claims.[5] Furthermore, Cofield presents claims on theories of liability that are absent in Smith.[6]

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[5]For example, several of the injured children in Smith are too young to permit adequate testing and evaluation. Plaintiffs' counsel, seeking to expedite the Smith case, have moved to sever so that the claims ready to proceed can move forward. If severance is denied Plaintiffs' counsel have stated an intent to dismiss Smith and file separate lawsuits.

[6]For example, causes of action for nuisance, indemnification and enterprise liability.

II. LEGAL STANDARD

A case may be remanded to state court following removal due to a defect in the removal procedure[7] or a lack of subject matter jurisdiction. 28 U.S.C. § 1447. Because the federal courts are courts of limited jurisdiction, removal is restricted, and all doubts concerning the propriety of removal are to be resolved in favor of retained state court jurisdiction. Marshall v. Manville Sales Corp., 6 F.3d 229, 232 (4th Cir. 1993).

In the case at Bar, Defendants allege that BPC, the Maryland Defendant whose presence defeats this Court's diversity jurisdiction, was fraudulently joined by the Plaintiffs solely for the purpose of defeating diversity. The Fourth Circuit recently re-affirmed the burden that a removing party faces when it alleges fraudulent joinder:

> The removing party must demonstrate either 'outright fraud in the plaintiff's pleading of jurisdictional facts' or that 'there is no possibility that the plaintiff would be able to establish a cause of action against the in-state defendant in state court.'

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[7]Plaintiffs "toss in" the meritless argument that there was a defect in the removal procedure because BPC did not "join" in Defendants' Motion for Reconsideration. BPC did join in Defendants' Notice of Removal. Moreover, "consent of fraudulently joined parties is not necessary for removal." Richardson v. Phillip Morris, Inc., 950 F. Supp. 700, 701 n.1 (D. Md. 1997).

> **The party alleging fraudulent joinder bears a heavy burden -- it must show that the plaintiff cannot establish a claim even after resolving all issues of law and fact in the plaintiff's favor. . . . This standard is even more favorable to the plaintiff than the standard for ruling on a motion to dismiss.**

Hartley v. CSX Transportation, Inc., 187 F.3d 422, 424 (4th Cir. 1999) (citations omitted).

If a district court concludes that the party seeking removal has met this heavy burden, it may dismiss the defendant who has been fraudulently joined so that the case may remain in federal court. Mayes v. Rapoport, 198 F.3d 457, 461 (4th Cir. 1999) (stating that the fraudulent joinder doctrine "effectively permits a district court to disregard, for jurisdictional purposes, the citizenship of certain nondiverse defendants, assume jurisdiction over a case, dismiss the nondiverse defendants, and thereby retain jurisdiction.") (citation omitted); see Fed. R. Civ. P. 21 ("Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just.").

III. DISCUSSION

Defendants do not allege outright fraud, however they claim that Plaintiffs have no possibility of establishing a claim against BPC. In response to Defendants' allegations of fraudulent joinder, the Plaintiffs in Cofield advance two[8] possible theories upon which to hold BPC liable: (1) successor liability, and (2) membership in a conspiracy to fail to include warnings on non-lead paint containers about the dangers associated with surface preparation.

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[8]**Plaintiffs have made isolated reference to the possibility that BPC may have manufactured and/or distributed lead paint after 1977. However, BPC did not begin doing business until 1979. Any allegation of post-1978 lead paint manufacture or distribution would be clearly outside of the scope of the Complaint, which expressly limits its claims based on manufacturing and distribution of lead paint to the period prior to 1978. See, e.g., Compl. at ¶¶ 20, 28-45, 55, 85-88. If Plaintiffs' counsel seriously believe that they have a potential cause of action against BPC for post-1978 manufacture or distribution, they can file a new law suit asserting such a claim.**

A. Successor Liability

Plaintiffs seek to hold BPC liable for the actions of its predecessor, Kewanee, in manufacturing and selling lead paint through its BP Division.[9]

In 1923, Eugene Bruning formed a paint company called "Bruning Brothers." Bruning Brothers was later incorporated, and named "Bruning Paint Company, Inc." In the late 1960s, Millmaster purchased Bruning Paint Company, Inc. In 1974, Millmaster, in turn, was purchased by Kewanee. The previous "Bruning Paint Company" became Kewanee's Bruning Paint Division (the "BP Division"). In October of 1978, Lawrence Ramer incorporated BPC, Ltd. On December 1, 1978, BPC Ltd. entered into an agreement with Kewanee to purchase the assets of the BP Division. The name "Bruning Paint Company" was one of the assets included in the agreement. On January 22, 1979, BPC Ltd. changed its name to "Bruning Paint Company" ("BPC"). Closing on the Assets Purchase Agreement occurred on February 1, 1979.

Under Maryland law, the general rule regarding successor liability is one of non-liability. The Maryland Court of Appeals has stated that:

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[9]**Tellingly, Plaintiffs have not sued Kewanee, although it is a large, viable corporation.**

> **a corporation which acquires all or part of the assets of another corporation does not acquire the liabilities and debts of the predecessor unless: (1) there is an express or implied agreement to assume the liabilities; (2) the transaction amounts to a consolidation or merger; (3) the successor entity is a mere continuation or reincarnation of the predecessor entity; or (4) the transaction was fraudulent, not made in good faith, or made without sufficient consideration."**

Nissen Corp. v. Miller, 594 A.2d 564, 565-66 (Md. 1991) (citations omitted). In Nissen, the Maryland Court of Appeals considered and rejected a fifth exception, dealing with "continuity of the enterprise" in the products liability context. Id. The Maryland Court of Appeals recently re-affirmed that the "continuity of enterprise" exception is wholly inapplicable to successor liability under Maryland law. Academy of IRM v. LVI Environmental Svcs., Inc., 687 A.2d 669, 677-80 (Md. 1997) (stating that the lower court's focus on the successor's performance of the same business functions as its predecessor, use of the same site as its predecessor, and retention of the predecessor's employees incorrectly emphasized the continuation of the enterprise, rather than the continuation of the entity).

Defendants contend that Plaintiffs have no prospect of recovery against BPC because none of the above exceptions to the general rule of successor non-liability can possibly apply to

this case. Plaintiffs present a smokescreen of assertions which, upon, examination, contains no substance. Plaintiffs, without adequate linkage to the Maryland law exceptions to the non-liability of successors, sweepingly contend that there are "numerous" contested issues, including:

> **(1) the amount of consideration involved in the transaction;**
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> **(2) the existence or non-existence of product liability insurance;**
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> **(3) any transfer of product liability insurance in connection with the Assets Purchase Agreement;[10]**
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> **(4) consideration of the transfer in the context of federal lead paint regulation at the time;[11]**
>
> **(5) the status of management personnel before and after closing on the Assets Purchase Agreement;**
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> **(6) the relationships between various corporate entities involved in the transaction; and**

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[10]The Court presumes that by raising the issue of the transfer or existence of product liability insurance, Plaintiffs are attempting to establish that BPC assumed liability. Yet, regardless of the transfer or existence of such insurance, Plaintiffs have no prospect of establishing that BPC assumed product liability claims arising out of actions prior to the asset transfer.

[11]The relevance, if any, of this allegation to the successor liability issues is unexplained and appears non-existent.

(7) Bruning paint and lead paint production and distribution before and after the transaction.

The Court concludes that each and every one of the "issues" raised by Plaintiffs is either irrelevant to successor liability, or conclusively determined by virtue of Defendants' unrefuted and unrefutable evidence.[12]

1. Assumption of Liability

There is no doubt that BPC did not expressly or impliedly agree to assume the liabilities - if any exist - of its predecessor regarding the manufacturing and sale of lead paint. The Assets Purchase Agreement between BPC and Kewanee forecloses such a conclusion. Under the agreement, BPC expressly agreed to assume certain liabilities, including balance sheet liabilities, contracts in the ordinary course of business and leases. Assets Purchase Agreement at 9-11. BPC expressly disclaimed assumption of all other liabilities or claims. Id. at 11. In addition, the agreement expressly addresses product liability claims and states that Kewanee "shall indemnify, defend and hold [BPC] harmless

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[12]The Court is not bound by the allegations of the pleadings, but may "consider the entire record, and determine the basis of joinder by any means available." AIDS Counseling and Testing Centers v. Group W Television, Inc., 903 F.2d 1000, 1003 (4th Cir. 1990) (citation omitted).

from any claims, loss or liability arising out of any product liability or similar or related claims made with respect to any goods manufactured by [Kewanee] prior to the Closing Date." Id. at 45. Accordingly, Plaintiffs cannot establish a cause of action against BPC for successor liability under the first (assumption of liability) exception in Maryland law.

2. Consolidation or Merger

There is no suggestion, and manifestly no possibility, that the transaction amounted to a consolidation or merger. Rather, it is apparent that BPC merely purchased a division of Kewanee, and that Kewanee continues to operate as a viable corporation today. See Certificate of Good Standing for Kewanee Industries, Inc. Accordingly, the second exception in Maryland law cannot apply.

3. Continuity of Entity

The Maryland Court of Appeals has explained that:

> **The mere continuation or continuity of entity exception applies where there is a continuation of directors and management, shareholder interest and, in some cases, inadequate consideration. The gravamen of the traditional 'mere continuation' exception is the continuation of the corporate entity rather than continuation of the business**

> operation. This exception focuses on the continuation of management and ownership.

Nissen, 594 A.2d at 567 (citations omitted); see Academy of IRM, 687 A.2d at 677.

The continuity of entity theory "is designed to prevent a situation whereby the specific purpose of acquiring assets is to place those assets out of reach of the predecessor's creditors. In other words, the purchasing corporation maintains the same or similar management and ownership but wears a new hat." Nissen, 594 A.2d at 566 (citations omitted).

In contrast, the continuity of enterprise theory, which has been expressly rejected in Maryland, "focuses on continuation of the business operation or enterprise where there is no continuation of ownership." Nissen, 594 A.2d at 567 (emphasis added). It is therefore clear that under Maryland law there must be some common ownership of the predecessor and the successor companies in order to warrant a finding of successor liability under the "continuity of entity" exception. Academy of IRM, 687 A.2d at 679.

Plaintiffs argue that they can establish that BPC may be held liable because BPC is a "mere continuation" of Kewanee's BP Division. Plaintiffs base their claim that BPC is the "mere continuation" of the BP Division on (1) the similarity of

management personnel before and after the transaction; (2) the fact that the business operations did not stop or change substantially at the time of the transaction; and (3) an employee's impression that he had been working for the same company from 1958 to the present.

The record evidence pertinent to the "continuity of entity" exception is, unquestionably, inadequate to raise any possibility of recovery for the Plaintiffs. First, four persons who were employed by the BP Division prior to the asset transfer were later employed by BPC. Irvin Ebaugh, Sr. ("Ebaugh, Sr.") was the President of the BP Division and became an honorary chairman of BPC after the transfer.[13] Irvin Ebaugh, Jr. ("Ebaugh, Jr.") worked for the BP Division[14] in various capacities, including general manager and vice president of sales. Ebaugh, Jr. Dep. at 21-22. He became president of BPC following the asset purchase. Id. at 16. John Rose was involved in the BP Division's finances and data processing, and became a vice president and treasurer of

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[13]**Ebaugh, Sr. had, at one time, held an ownership interest in KBPD's predecessor, Bruning Brothers (later known as Bruning Paint Company, Inc.). However, at the time of the transfer of the BP Division from Kewanee to BPC, Ebaugh, Sr. held no ownership interest in Kewanee, and of course, Kewanee owned all of the assets of its division, the BP Division. Ebaugh, Jr. Dep. at 40.**

[14]**And its predecessors.**

BPC after the asset purchase. Id. at 81-82. Finally, Larry Collins ("Collins") worked for the BP Division[15] in various capacities prior to the transfer, including data processing, sales service manager, and director of administrative services. Collins Dep. at 13, 23, 63. Collins is still employed by BPC today. Id. at 10. Second, the parties appear to agree that BPC continued operating more or less as the BP Division had immediately before the transfer, manufacturing and distributing paint.[16] Finally, Plaintiffs point out that Collins testified that he believed that he had been working for the "same company" from 1958 to the present. Collins Dep. at 96. For the reasons that follow, the Court concludes that there is no possibility that Plaintiffs could establish that BPC was a "mere continuation" of the BP Division.[17]

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[15]**And its predecessors.**

[16]**It does appear, however, that BPC closed many of the BP Division's retail outlets following the transfer. Ramer Dep. at 67-68.**

[17]**Although not referenced by Plaintiffs, the Court notes that there is evidence in the record that BPC may have traded on the goodwill of the BP Division and its predecessors. The use of the predecessor's goodwill, however, is "not sufficient to give rise to continuation of the entity liability or to persuade [the Maryland Court of Appeals] to recognize the continuation of the enterprise as a basis for liability." Academy of IRM, 687 A.2d at 678; Nissen, 594 A.2d at 570, 573-74. Similarly, the fact that BPC used the trade name of the BP Division following the asset transfer does not establish, or tend to establish, that it was a "mere continuation" of the BP Division. Academy of IRM,**

The mere fact that several employees of the BP Division became employees and/or officers of BPC following the transfer is not sufficient to establish the applicability of the "continuity of entity" exception, particularly in light of the fact that none of those employees had any ownership interest in Kewanee or BPC. Nissen, 594 A.2d at 572; see Academy of IRM, 687 A.2d at 679 (no successor liability even though two officers of predecessor became officers of successor, when no former shareholder of predecessor was a shareholder of successor). While continuity of employees and officers might be relevant to a "continuity of enterprise," this does not tend to establish "continuity of entity." In Nissen, the Maryland Court of Appeals expressly rejected the idea that successor liability is appropriate where the successor corporation "continue[s] at its same address with virtually all of its same employees." 594 A.2d at 572 (refusing to adopt the rationale of Holloway v. John E. Smith's Sons Co., 432 F. Supp. 454 (D.S.C. 1977)).

The fact that BPC continued the BP Division's business operations is insignificant. Of course it did, inasmuch as BPC purchased the assets of an operational division. The Maryland Court of Appeals has expressly rejected the idea that the fact

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687 A.2d at 678; Nissen, 594 A.2d at 568.

that the business operation continued virtually uninterrupted should result in successor liability. Id. (refusing to adopt the rationale of Turner v. Bituminous Cas. Co., 244 N.W.2d 873 (Mich. 1976)); see Academy of IRM, 687 A.2d at 678.

Finally, Collins deposition testimony regarding his own belief that he worked for the same company adds nothing to the Plaintiffs' claim of "continuity of entity." Any belief that Collins, a layperson, held regarding the identity of his employer is completely irrelevant to the legal question of whether BPC was the "mere continuation" of the BP Division under Maryland law. Furthermore, Collins' own deposition testimony establishes that he did not believe that BPC and the BP Division had common ownership. Collins. Dep. at 96-98. Accordingly, Plaintiffs cannot possibly impose liability on BPC under the "mere continuation" exception to the general rule of successor non-liability.

4. Fraud or Inadequate Consideration

Plaintiffs assert that BPC's purchase of the assets of the BP Division was designed to defraud creditors, including anyone with a claim against Kewanee. This argument is completely meritless. Kewanee expressly retained liability for all product liability claims. Assets Purchase Agreement at 45.

Plaintiffs' counsel didn't, or refused to, understand the thrust of the fraudulent transfer exception. This exception focuses explicitly on the predecessor's attempt to avoid liability. By expressly agreeing to retain liability for claims arising out of the manufacture or sale of products prior to closing, Kewanee could not possibly have been attempting to duck its obligations to potential products liability plaintiffs. The "fraud" exception is therefore inapplicable.

Plaintiffs make a baseless claim regarding the adequacy of the consideration paid by BPC for the BP Division assets. Plaintiffs base this contention on the balance sheet that was attached to the Assets Purchase Agreement which shows a book value of total assets of $11,664,205. See Bruning Paint Division Consolidated Statement of Financial Position, October 31, 1978. In reaching this figure, the Court notes that Plaintiffs have failed to subtract the total liabilities of $1,920,602, which would leave the net book value of the company at approximately $9.7 million dollars. Moreover, there is no direct relationship between the book value (adjusted cost basis) of the assets of an entity such as the BP Division and the fair market value of the assets.

Plaintiffs contend that BPC "paid" a mere $2.4 million for KBPD's assets, and that this gives rise to a claim that the

consideration was inadequate. Plaintiffs have completely disregarded the reality of the transaction. Although BPC expressly disclaimed the assumption of products liability claims, BPC did assume certain specific liabilities in connection with the transaction, amounting to approximately $3.4 million in liabilities. In addition, Kewanee retained approximately $3.6

million in receivables. Thus, using book value for illustrative purposes, consideration for the transaction would be stated as follows:

Cash:	**$2.4 million**
Liabilities: (assumed by BPC)	**$3.4 million**
Receivables: (retained by BP Division)	**$3.6 million**
TOTAL:	**$9.4 million**

Plaintiffs present nothing of the slightest potential merit to refute the compelling evidence that the acquisition was an arm's length transaction between sophisticated parties. There is neither a scintilla of evidence, nor any prospect of evidence, that would permit any non-frivolous argument that the transaction was fraudulent, in bad faith, or for inadequate consideration. It is irrefutable that the consideration paid by BPC "was based on the total contract, including the provision that the predecessor retain all liability for injuries caused by it before the asset purchase." Nissen, 594 A.2d at 568. Accordingly, the fourth exception to the general rule of successor non-liability cannot apply. There is no possibility of successor liability against BPC.

B. Failure to Warn About Risks Associated With Surface Preparation

Plaintiffs contend that they have a potential cause of action under Maryland law due to BPC's failure to include warnings on its non-lead paint containers regarding the hazards associated with surface preparation. Plaintiffs allege that BPC's existing products instruct consumers to sand, scrape, wipe and otherwise prepare painted surfaces for repainting, without regard for the known risk that such activities will disturb pre-existing lead paint and create a danger of lead poisoning. However, the "failure to warn" claim is not contained in the Complaint, and is therefore not a part of this lawsuit.

An examination of the Complaint reveals that Plaintiffs' allegations concerning BPC's surface preparation instructions and failure to warn of the hazards associated with surface preparation cannot accurately be characterized as part of the instant lawsuit. Plaintiffs point to paragraphs 264-67 and paragraphs 359-375 in support of their contention that the "failure to warn" claim is indeed within the scope of this lawsuit. Paragraphs 264-67, as Plaintiffs point out, deal with an alleged failure to include warnings about the hazards associated with surface preparation. However, Plaintiffs' allegations consist largely of generalized statements concerning

events occurring "from the 1950s to the present." Compl. at ¶ 264. The allegations in the paragraphs which follow are confined to incidents which the Plaintiffs claim occurred in 1955. Id. at 265-67.

The only specific incidents pointed out by Plaintiffs in response to Defendants' instant Motion occurred in 1954, 1955, and 1960. See August 12, 1954 Report of Subcommittee on Model Labeling; January 19, 1955 Minutes of Meeting of Industrial Label Committee; June 14, 1960 Letter from Francis Scofield to National Paint Varnish & Laquer Ass'n Scientific Committee Members. BPC, however, was not in existence prior to 1979.[18] Plaintiffs present nothing to advance their argument that BPC, which did not exist until 1979, could possibly be held liable for these actions.[19]

Plaintiffs rely on paragraphs 359-375 of the Complaint to support their contention that their claims regarding surface preparation are within the scope of the instant lawsuit. These paragraphs allege a "conspiracy" and "concert of action" among

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[18]As discussed above, BPC cannot be held liable as a successor to Kewanee.

[19]Compare Yousef v. Trust Bank Savings, F.S.B., 568 A.2d 1134, 1139-40 (Md. Ct. Spec. App. 1990) (refusing, in a case alleging a conspiracy to fraudulently induce a sale, to impose liability on an entity which became involved in financing the sale after the sale had been consummated).

all Defendants. However, these paragraphs deal with Defendants' acts in marketing lead and lead pigments and placing such products into the stream of commerce, and do not include any allegations concerning surface preparation. A fair reading of the Complaint reveals that the conspiracy that Plaintiffs' allege is one involving the presence of lead paint in pre-1978 homes; not one involving resurfacing instructions.

As stated by Plaintiffs, "[t]he purpose of this action is to hold accountable . . . those corporations and entities that are responsible for the massive contamination or private non-rental residential dwelling units throughout the state of Maryland." Compl. at ¶ 2. The Complaint, again and again, references the period prior to 1978. See, e.g., id. at ¶¶ 6, 13, 15, 85, 87. Specifically, the Plaintiffs' claims are premised on the manufacture, marketing, distribution and sale of lead pigments prior to 1978. See, e.g., id. at ¶¶ 20, 28-45, 55, 85-88. And, the relief requested by the Plaintiffs makes it clear that abatement of the lead paint that exists in pre-1978 housing is the ultimate goal of this lawsuit. See, e.g., id. at 15-16, 18, 46, 87, 290, 299, 307.

Moreover, the Complaint specifically states that the goal of the lawsuit is abatement: "The financial burden of residential abatement should be borne by the Defendants which created the

problem of lead-contaminated housing. IT IS TIME FOR THEM TO HELP PROPERTY OWNER VICTIMS GET THE LEAD OUT." Id. at 19 (emphasis in original). The Complaint further states that "[t]he underlying basis for the joint and several liability of the Defendants is their decades-long tortious conduct in knowingly producing, processing, promoting and marketing toxic, ultra-hazardous processed lead and lead pigments as components of paint applied to interior and exterior residential surfaces." Id. at 20, 55.

The Complaint does not, as Plaintiffs argue, allege a conspiracy regarding resurfacing, and the relief requested deals solely with the abatement of the lead paint hazard which exists in pre-1978 housing.[20]

Maybe there is a possible cause of action against all paint manufacturers (or maybe others as well) with regard to the post-1978 surface preparation instructions on their paint cans and the lack of warnings concerning the hazards associated with surface preparation. If there is, perhaps Plaintiffs' counsel will bring a law suit asserting such a claim. However, they have not presented that claim in the instant case.

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[20]Plaintiffs are seeking damages in excess of $20,000 per unit, the approximate cost of professional lead paint removal services for the average home. Compl. at ¶ 15.

There is no possibility of recovery against BPC on the causes of action set forth in the Complaint. BPC, having been joined fraudulently, shall be dismissed. The case, therefore, is within the diversity jurisdiction of this Court.

IV. CONCLUSION

For the foregoing reasons:

1. **Defendants' Motion for Reconsideration and Dismissal of Bruning Paint Company (Paper # 16) is GRANTED.**

2. **Plaintiffs' Renewed Motion to Remand (Paper # 18) is DENIED.**

3. **The Court's Order Remanding Case entered on November 24, 1999 is hereby VACATED.**

4. **Bruning Paint Company's Motion to Dismiss and/or for Summary Judgment (Paper # 22) is DENIED as MOOT.**

5. The Court shall arrange a case conference promptly.

SO ORDERED this 15th day of March, 2000.

Marvin J. Garbis
United States District Judge